

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE - *claimant*

CASE NO.

MN602/2006

UD910/2006

WT298/2006

against

EMPLOYER - *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Mahon

Members: Mr P. Pierson
Mr O. Nulty

heard this claim at Longford on 17th May 2010
and 8th September 2010

Representation:

Claimant(s) : Mr. Shane Geraghty BL instructed by John J Quinn & Co, Solicitors,
Earl Street, Longford

Respondent(s) : Mr. Stephen O'Sullivan BL instructed by Nooney & Dowdall, Solicitors, Mary
Mullingar, Co. Westmeath

The determination of the Tribunal was as follows:-

Respondent's Case

The claimant was a sales person of the respondent. The respondent was a wholesale supplier of cakes. At the outset the respondent accepted that no procedure was in place prior to the dismissal and that the dismissal was procedurally unfair but was a reasonable response in the circumstances of the allegations. The allegations were that on four dates between 22 and 27 July 2006 that the claimant removed unlawfully 45 boxes of tinnocks teacakes and further purchased diesel using a

fuel card supplied by the respondent to pay for diesel for work purpose in circumstances where he was on holidays and not driving the respondent's work vehicle. In such circumstances the respondent was contending that summary dismissal was warranted and that the respondent's behaviour was reasonable.

Counsel for the respondent called a Director of the Company ("the first director"). The first Director gave evidence that there was no written contract and no procedure regarding complaints. Furthermore he explained the operation of the business. The claimant worked out of a depot. Stock was essentially distributed from the main distribution centre to the depot as ordered. Their salesmen were issued with hand held machines and details of the purchasers were entered into the hand held machine. The machine had the details of the customers to which that particular van driver was servicing entered into it. The machine was also capable of issuing cash invoices. In certain instances it may have been necessary for the van driver to manually amend the docket issued by the machine so as to facilitate the furnishing of a cash invoice to the customer. At the end of each week the employee submitted the dockets issued by the machine to central billing. If there was a cash sale then the sales man inputted the data to the hand held machine and handed over the cash to the respondent. However, virtually all the claimant's transactions were credit sales. The first Director also detailed a procedure whereby the sales man would get an employee of the customer to stock the shelves. This individual was called a merchandiser.

The first Director in reply to Counsel gave evidence that they also supplied goods to other wholesalers and gave A. D. as an example. He gave evidence that there had been two deliveries to A. D. within the last 18 months. Both were cash sales. One had been by him and the other by another worker. The claimant had not been authorised to sell to the Competitor.

The first Director gave evidence of noticing that the claimant had not been recording sales of teacakes from December 2005. A booklet of papers was handed in which the exhibited dockets showed that there were no sales of teacakes by the claimant for a specific week. He then gave evidence of putting in place a security camera, the sole purpose of which appeared to have been to examine the activities of the claimant. The other salesmen were aware of the camera. The first Director gave evidence of an incident on 20 July 2006 when 15 cases were viewed being loaded into the claimant's vehicle and a further 15 cases on 25 July 2006 and a further 5 cases on 26 July 2006 and a further 10 cases on 27 July 2006 totalling 45 cases all of the same product, tunnocks teacakes. The claimant viewed the sales docket/records of the claimant for the weekend ending the 27 July 2006 and according to the sales documentation there was no sales of tunnocks teacakes. The claimant went on holidays on 27 July and the respondent had an inventory carried out of the items left in the van. The evidence given was that there were no tunnocks teacakes left in the van.

Furthermore, the first director gave evidence of the purchase of diesel on 29 July by the claimant. He was not working and was not driving a work vehicle yet gave a work vehicle number. Evidence was given that he was not entitled to use the company diesel card when he was on holidays or to purchase fuel for his private vehicle.

In respect of the contention to be made by the claimant that he supplied the goods to AD ("the Competitor"). The procedure would be for him to print off a dummy docket and manually amend it. Counsel enquired whether or not the claimant had requested docket books from him. His evidence was that the claimant did not request docket books.

In respect of the goods that were allegedly supplied to the competitor he received a cheque from the competitor after the date of the claimant's dismissal and after the date that the claimant was

questioned by Gardaí in respect of the allegation of theft. He sent the cheque back to the competitor. The cheque was not dated and it was for the cost price of the items.

Under cross examination he confirmed that the Applicant was employed in August 2001 by the company and that there was no contract and no grievance procedures in place. He confirmed that the claimant started as a van delivery man covering Galway, Roscommon and Longford and that he was trained by one of the Directors in the use of the hand held device.

It was put to him that it was not possible for the claimant to use the hand held device to issue an invoice to cash customers as the percentage mark up changed depending on the customer. This was rejected. It was not necessary to change the percentage. The mark up is pre-programmed for the existing customers. Likewise for cash sales the mark up is pre-programmed and there is no need to change the percentage. Under cross examination the witness confirmed that he dealt with the competitor on two occasions. He was contacted by the competitor to sell him the tunnocks teacakes. The witness gave him a price and sold the items to him. He advised that he was not able to identify a cash sales docket for the competitor as the name is not on the invoice. As far as he could recall the claimant delivered the items to the competitor. On the second occasion the competitor contacted him and another employee looked after the competitor. It was put to him that the competitor was told to deal directly with the claimant. This was denied by the First director.

The first director was questioned about when he first became suspicious. He thought it was May/June 2006. He confirmed that all other drivers were aware of the cameras.

The first director confirmed that the claimant had not received a pay rise since 2001. The claimant was on commission and the commission had increased since he had commenced but there had been no change in the basic salary. He confirmed that he had no issue until the teacakes went missing. He confirmed that he gave the claimant a loan which was repaid.

When questioned about the sale of the 45 tunnocks cakes to the competitor the witness reiterated that the claimant had no authority to sell to the competitor. It was put to the first director that the claimant will give evidence that he was told by him that if there was a deal to be done then do it. He denied this and said that the claimant needed to get a price from him and he gave evidence that he never told the claimant to deal with the competitor.

On enquiry from the Tribunal the witness confirmed that the docket book referred to is a back up to the hand held device.

The next witness for the respondent was another Director (“the second director”). In direct evidence he confirmed that he trained the claimant and this included showing him how to do cash sales. He denied that the claimant did not know how to do cash sales. The documentation produced showed clearly that the claimant was able to issue cash sales. He confirmed that he carried out an inventory of the vehicle after the claimant went on holidays and that there were no tunnocks teacakes in the van. In respect of dealing with wholesalers/competitors they would only deal with the first director. The drivers only deliver the orders. He denied that the merchandisers were paid in cakes. Further he denied that any request had been made to him for docket books by the claimant.

Under cross examination he confirmed that he trained the claimant. He was with the claimant for the first month every day and showed him how things were done. He checked up on him periodically thereafter. There were problems with the claimant regarding the utilisation of the space in the shops but that he was 70% right. He had warned him about his work and how the stocking

had to be done right.

When it was put to him that an order from the competitor would need to be put into a docket book he rejected this. It is only if the order came from the warehouse that the competitor's details would be entered into the warehouse docket book. He denied that the claimant had requested docket books. He said he did not look for docket books in the van. They would not be particularly concerned about the particular competitor referred to as he was a small competitor but they would require him to pay cash on delivery. They would not have allowed the claimant to decide who he could deal with. It was a matter between the first and second director to decide as to who he should deal with. They would have to know who the drivers are dealing with.

It was put to him that he had asked the competitor to do deliveries for the company. The witness was 90% sure that he never asked the competitor to do a delivery. The witness was questioned about the deal between the other employee and the competitor. He was not privy to the deal, but either way the goods would only be supplied, cash on delivery.

Claimant's Case

The claimant gave evidence that he had no experience with hand held devices. Initially he used delivery books making deliveries to Tesco in the west of Ireland. He was trained by (DS) and not the Second Director. The Second Director started working with him in 2003. The other Director had his own van supporting him. His evidence was that he was quite simply urged to fill the van with stock and sell it. For the last 18 months of his employment he was on commission and he was being pushed to create sales. Prior to this he was paid a basic salary. He made deliveries to large multiples and not small independent retailers. He utilised the handheld machine and the docket book was a backup. He did not accept the witness for the respondent that the handheld device broke down on occasion. It broke down much more frequently than occasionally. He gave evidence that he had requested a docket book from Dublin and that the docket books were hard to get.

He was in good standing with the respondent. He had got a loan on two occasions between 2003 and 2006. He had paid back the last loan in June 2006 totalling €6,000. From 2001 to 2006 there was no wage increases. He had been on commission for 18 months. He raised the issue of his wage a couple of times three to four weeks before he was dismissed. He gave evidence of being approached by another retailer, (AD), in or about January 2005. He passed him on to one of the Directors who approved him dealing with (AD). He gave evidence of having a continuous business relationship with him. (AD) acted, in effect, as a courier for his employer.

At or about the end of July 2006 (AD) contacted him looking for 35 boxes of tinnets tea cakes. (AD) suggested that they would meet in Tuam and he would collect the 35 boxes. The witness suggested that he make three deliveries and that the (AD) would settle up on the last visit. He said it was not necessary to speak with one of the Directors as they already had a relationship with (AD). He met (AD) at Supervalu in Tuam on a Thursday. He asked for payment but (AD) was looking for a docket. He could not give (AD) a docket. (AD) was complaining that this was the third time that he had bought off the company and got no docket. He wasn't going to pay until he got a docket. The claimant was due to go on holidays the following day. He arrived back from holidays and went to meet with his employer but instead was met by the Gardaí and was arrested.

The witness denied that he could give a print out from the handheld device for a wholesaler such as (AD). After that the claimant was cross examined. He denied that the samples of handwriting were his. He denied knowing about the 999 procedure for retail cash sales. He gave evidence that the

only cash calls he ever did was to (AD). Under cross examination he gave evidence of what he had done after leaving work. He started a car valeting business which did not succeed. He was in receipt of social welfare. He has worked for roughly 16 months in the last four years. No P60's were furnished. On redirection he gave evidence of the interviews that he had attended.

(AD) also gave evidence of the nature of the relationship between him and the respondent company and of the deal that he had done with the claimant. A former driver of the respondent company was also called to give evidence. He gave evidence that the docket books were used when the handheld devices were not working. Further he stated that he did not know how to do cash sales but had heard it mentioned. He never did cash sales.

Determination

(a) Regarding the substantive claim of unfair dismissal, consideration of the claim is extremely difficult in circumstances where there are significant differences between the witnesses as to the work practices that prevailed and the degree of autonomy afforded to individual drivers. This was made more difficult in the context of the protracted eventual hearing before the Tribunal, the facts having been well aired by the time this matter came before the Tribunal, and the Tribunal is left with the unenviable task of having to consider the veracity of the various parties' account of the matters. It is impossible for the Tribunal to fairly come down on either side's account of the work practices and the degree of autonomy afforded to drivers. Rather the Tribunal has looked at the incident itself and concluded that the respondent's actions in summarily dismissing the claimant were disproportionate.

(b) The Tribunal having considered the evidence of the directors of the respondent company and the evidence of the claimant and (AD) is satisfied that there was inappropriate behaviour on behalf of the claimant. The evidence advanced by the claimant and (AD) regarding the nature and extent of the relationship was not consistent and furthermore the evidence of the directors was that this relationship was not approved by them. That being so the conduct of the respondent in arranging a meeting with the claimant on his return from holidays for the purpose of facilitating the claimant being arrested for questioning by the Gardai was ill advised.

The respondent should have carried out an investigation and afforded the claimant an opportunity to explain what had transpired prior to going on holidays. There are obvious difficulties when it is that an employer decides that the conduct of the employee is such that it warrants summary dismissal and a Garda investigation. Ultimately it is a judgement call on the part of the employer. In this instance the employer chose the wrong option in summarily dismissing the employee without even putting the allegation to him, never mind affording him an opportunity to respond to the allegation. The Tribunal considered the evidence of the parties regarding the nature and extent of the relationship between the respondent company, the claimant, and AD and whether or not it was permitted, and the conflicting evidence regarding the use of the handheld device and whether or not the claimant was able or not to do cash sales. The Tribunal has come to a conclusion that the dismissal was unfair, primarily on the basis that the actions, which are not disputed, of the employer were disproportionate and the more appropriate response would have been to investigate their concerns prior to summarily dismissing the claimant.

Simply because a criminal investigation and prosecution may follow from a dismissal does not obviate the necessity for fair procedures to be followed prior to summary dismissal. In the instant case it would have been more prudent on the part of the respondent to, at a minimum, put the allegation to the claimant such that the claimant could be afforded the opportunity to explain the

circumstances.

No evidence was given in respect of the claim under the Organisation of Working Time Act. Accordingly this claim fails.

The Tribunal in assessing the level of damages to award to the claimant was not impressed by the conduct of the claimant in failing to record the sales and inform the respondent. The sales to (AD) were significant and were all the more so in circumstances where his salary was based on commission. The claimant contributed significantly to the circumstances giving rise to his summary dismissal and in the circumstances the Tribunal have deemed him 50% responsible. A sum of €17,000 is awarded under the Unfair Dismissals Acts 1977 to 2007.

The Tribunal also determines that the claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 succeeds and awards the claimant the sum of €2,188.00 being the equivalent of four weeks pay under the said Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

